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Supreme Court of the United States

OCTOBER TERM, 1943. No. 365.

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ADRIAN ETTELSON, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENT	4
Point I—The Circuit Court of Appeals did not decide any question of local law in a way probably in conflict with applicable local decisions	4
A. The lower court recognized that an insurer in New Jersey could defeat liability by showing that insurance was procured by material misrepresentations untrue in fact, without proof of conscious or intentional fraud	4
B. The New Jersey equitable remedy of cancellation is based not on differences in burden of proof but upon the Chancery Court's concept of adequacy of the legal remedy, which the Federal Courts determine under Federal law	8
Point II—The Circuit Court of Appeals did not decide a Federal question of substance in a way probably not in accord with applicable decisions of this Court	11
Point III—The ruling below is in harmony with a long line of insurance decisions by this Court involving the issue of fraud	13
A. The rule concerning fraud in the procurement of insurance policies prior to *Erie* v. *Tompkins* and the new Rules of Civil Procedure	13

PAGE

B. The Federal rule concerning fraud in the procurement of insurance has not been altered by *Erie* v. *Tompkins* and the new Rules of Civil Procedure strengthen its rationale by eliminating certain *quia timet* grounds 15

Point IV—The decision of the Circuit Court of Appeals introduces no novel doctrines and cannot cause confusion 17

Conclusion 19

Cases Cited.

Adamos v. *N. Y. Life Ins. Co.*, 293 U. S. 386 14
American Life Ins. Co. v. *Stewart*, 300 U. S. 203....2, 6, 14
Atlas Life Ins. Co. v. *W. I. Southern, Inc.*, 306 U. S. 563 ..... 6, 15

Bauman v. *Whiteley*, 57 N. J. L. 487, 31 Atl. 982 5
Black & Yates, Inc. v. *Mahogany Ass'n, Inc.*, 129 F. (2d) 227, cert. den. 317 U. S. 672 11

Cable v. *U. S. Life Ins. Co.*, 101 U. S. 288 14
Cates v. *Allen*, 149 U. S. 451 9
Central Vermont Ry. Co. v. *White*, 238 U. S. 507.... 10

Diederich v. *American News Co.*, 128 F. (2d) 144.. 11
Di Giovanni v. *Camden Fire Ins. Ass'n.*, 296 U. S. 64 14

Eggers v. *Anderson*, 63 N. J. Eq. 264, 49 Atl. 578 6
Enelow v. *N. Y. Life Ins. Co.*, 293 U. S. 379 14
Erie R. Co. v. *Tompkins*, 304 U. S. 64 .....2, 3, 8, 11, 12

First Camden National Bank & Trust Co. v. *Aetna Casualty & Surety Co.*, 132 F. (2d) 114, cert. den. 63 S. Ct. 1157 12

Grand Chute v. *Winegar*, 15 Wall. 373 14

PAGE

Hipp v. *Babin*, 19 How. 271 14
Hollingsworth v. *General Petroleum Corp. of California*, 26 F. Supp. 917 11

Johns v. *Wilson*, 180 U. S. 440 10

Killian v. *Ebbinghaus*, 110 U. S. 568 14

Lewis v. *Cocks*, 23 Wall. 466 14
Livingston v. *Maryland Ins. Co.*, 6 Cranch. 274 14

Maxwell v. *Enterprise Wall Paper Mfg. Co.*, 131 F. (2d) 400 12
M'Lanahan v. *Universal Ins. Co.*, 1 Pet. 170 14
Metropolitan Life Ins. Co. v. *Lodzinski*, 124 N. J. Eq. 357, 1 Atl. (2d) 859 ..... 4, 18
Metropolitan Life Ins. Co. v. *Babb*, 128 N. J. Eq. 391, 16 Atl. (2d) 548 ..... 5, 18
Mississippi Mills v. *Cohn*, 150 U. S. 202 9

New York Life Ins. Co. v. *McCurdy*, 106 F. (2d) 181, cert. den. 309 U. S. 656 18
New York Life Ins. Co. v. *Steinman* 5
New York Life Ins. Co. v. *Weiss*, 133 N. J. Eq. 375, 32 Atl. (2d) 341 5

Phoenix Mutual Life Ins. Co. v. *Bailey*, 13 Wall. 616 14
Prudential Ins. Co. of America v. *Moore*, 231 U. S. 560 14
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491 ..... 9, 10

Root v. *Railway Co.*, 105 U. S. 189 14
Russell v. *Todd*, 309 U. S. 280, rehearing denied 310 U. S. 658 ..... 8, 9

Scott v. *Neely*, 140 U. S. 106 9

The Macabees v. *City of North Chicago*, 125 F. (2d) 330 12

Whitehead v. *Shattuck*, 138 U. S. 146 9
Willard v. *Wood*, 135 U. S. 309 10

Federal Constitution.

PAGE

Seventh Amendment 13

Federal Statutes.

Judiciary Act § 16 ..... 10, 16, 17
Rule 8 (e) (2) 17
Rule 26 (d) (3) 17
Rules 26-34 16
Rule 41 16
Rule 43 (b) 16
Title 28 U. S. C. § 347 1
§ 384 13
§ 723c 16
§ 398 17
§ 274 (b) 17

Other Authorities.

Beale, Conflict of Laws (1935) Vol. I, § 8A.28, pages 85-86 10
Beale, Conflict of Laws (1935) Vol. III, § 594.1, page 1607 11
The Restatement of the Law of the Conflict of Laws (1934), § 594, page 709 11
3 Moore's Federal Practice (1938), page 3041 16

Supreme Court of the United States

No. 365. October Term, 1943.

Metropolitan Life Insurance Company,
Petitioner,

vs.

Adrian Ettelson, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 42 Fed. Supp. 488 (R. p. 54a). The opinion of the Circuit Court of Appeals is reported in 137 F. (2d) 62 (R. p. 71).

Jurisdiction.

Petitioner has based its application for *certiorari** on the jurisdiction granted to this Court by Title 28 U. S. C. § 347.

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* All italics ours.

Statement of the Case.

The question presented by this case to the lower courts was whether, in an action pending to recover death benefits under certain policies of insurance to which the insurance company filed an answer setting up a series of defenses to the effect that the policies were obtained by the fraud of the insured and were void because of false statements made by him in the application therefor, the insurance company might also properly supplement its answer with a counterclaim asking for the equitable relief of cancellation and rescission of the policies on the ground of fraud of the insured, based on the same false statements in the application as are alleged in the answer.

In its answer (R. p. 15a) petitioner alleged several defenses of fraud and false representations. In its counterclaim for cancellation (R. p. 28a) it set forth the identical questions and answers relied upon as legal defenses except that the answers were now characterized as either *false* or *false in fact*. Both the District Court (R. p. 58a) and the Circuit Court of Appeals (R. p. 75) expressly held that the counterclaim did not plead special circumstances of a *quia timet* nature.

Accordingly both courts recognized (R. pp. 57a, 75) the applicability of the long-standing rule of this Court "that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available". *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 212 (1937). The District Court concluded, however, that *Erie R. Co.* v.

Tompkins, 304 U. S. 64, (1938), abrogated this rule in the Federal Court for the District of New Jersey because, under the system of separate law and equity courts in that state, relief by way of cancellation for unintentional misrepresentations was obtainable only in a state equity court (R. p. 60a). The District Court, following New Jersey procedure, ordered a hearing on the counterclaim "by the Court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs" (R. p. 62a).

The Circuit Court of Appeals reversed this order because (1) New Jersey procedure in allowing bills for cancellation of policies after a loss has occurred, traceable to the separation of law and equity courts, does not bind the Federal Court in that state to grant the same equitable remedy, legal and equitable defenses being available in the same proceeding, (2) Federal law determines trial procedure in the Federal courts, including the question of a hearing before the court alone or trial by jury, and (3) the rule of this Court concerning fraud in the procurement of insurance preserves the right of jury trial, with the assurance to petitioner of all substantive defenses available under New Jersey law, including those based upon honest misrepresentation as well as those predicated upon intentional fraud.

ARGUMENT.

POINT I.

The Circuit Court of Appeals did not decide any question of local law in a way probably in conflict with applicable local decisions.

A.

The lower court recognized that an insurer in New Jersey could defeat liability by showing that insurance was procured by material misrepresentations untrue in fact, without proof of conscious or intentional fraud.

1. *Distinction between legal and equitable fraud in New Jersey and the historical reasons therefor.*

Point I A of Petitioner's argument is devoted to an exposition of the New Jersey law to the effect that the Court of Chancery of that state will grant the equitable remedy of cancellation of a policy of insurance where the fraud charged consists of material representations, false in fact, made without either knowledge of their falsity or intent to deceive, while the law courts of that state will recognize fraud as a defense to an action on the policy only if the element of *scienter* is present. This general statement is subject to two significant refinements:

In *Metropolitan Life Ins. Co.* v. *Lodzinski*, 124 N. J. Eq. 357, 1 Atl. (2d) 859 (Ct. of E. & A. 1938), cited on page 10 of Petitioner's brief, it was held that the Court of Chancery is required to entertain a bill charging conscious fraud in the procurement of insurance and, upon final hearing, to

give relief of cancellation if complainant proves either the legal fraud charged in the bill or equitable fraud. This doctrine was reaffirmed recently in *N. Y. Life Ins. Co.* v. *Weiss*, 133 N. J. Eq. 375, 32 Atl. (2d) 341 (Ct. of E. & A. 1943).

In *Metropolitan Life Ins. Co.* v. *Babb*, 128 N. J. Eq. 391, 16 Atl. (2d) 548 (Ct. of Ch. 1940), it was held that where a bill for cancellation expressly disclaimed intentional fraud but the proofs established such fraud, relief should nevertheless be granted, since complainant was properly in equity and would have prevailed at law.

Thus petitioner has, in its various cases before the New Jersey courts, helped establish the full amplitude of the powers of the Court of Chancery over all claims of fraud, legal and equitable, in the procurement of insurance policies. This process was facilitated by two historical factors which have had radically different developments in New Jersey and in Federal jurisprudence:

(a) The historic *quia timet* grounds for the equitable remedy of cancellation have been, and still are, considered applicable to insurance controversies in New Jersey. The quotation on page 11 of petitioner's brief from *N. Y. Life Ins. Co.* v. *Steinman* is typical. The possibility of "studied delay" is real under the New Jersey procedural rule that a plaintiff in an action at law has an unqualified privilege to withdraw his case from the cognizance of the court by taking a voluntary non-suit at any time before the jury has retired for the consideration of their verdict. *Bauman* v. *Whiteley*, 57 N. J. L. 487, 489, 31 Atl. 982 (Sup. Ct. 1895).

As will be shown hereafter Federal procedure has developed so as to remove the foundations of most of the his-

toric *quia timet* grounds, resulting in the formulation of the narrower doctrine of "special circumstances" which may induce equitable intervention. *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937); *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563 (1939).

(b) Bearing in mind the continuous separation of the law and equity courts in New Jersey, *Eggers* v. *Anderson*, 63 N. J. Eq. 264, 49 Atl. 578 (Ct. of E. & A. 1901) points out an important difference between the New Jersey and the Federal courts in the administration of equitable remedies. After developing the breadth of the English doctrine of equity jurisdiction over every case of fraud, the Court said (p. 271):

> "Undoubtedly the American courts have not generally upheld so broad a jurisdiction, being influenced probably, and sometimes controlled, by enactments similar to the United States Judiciary act of 1789, which declared that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawing from our court of chancery any jurisdiction possessed by its English prototype. True the jurisdiction of equity, in cases of fraud remediable at law, has not been much invoked, but that may be accounted for, in large degree, by the less expensive, equally efficient and in former times more speedy, remedy secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted."

Thus it is clear that the state cases cited above and under petitioner's Point I A rest upon an absence of constitutional or statutory limitations on the New Jersey Court of Chancery restricting the exercise by that court of the ancient equity powers derived from the mother country.

The Federal courts, on the other hand, were empowered to administer the same body of equitable principles and remedies, *subject, however, to the restrictions of the Constitution and the Judiciary Act.* It is of no moment whether the New Jersey Court of Chancery was rightly held to be untramelled in its power to deal with all kinds of fraud cases. What is important is that this Court has held the contrary as to the forum which Petitioner has chosen, as will appear *infra.*

2. *The Circuit Court of Appeals gave full recognition to the New Jersey substantive law.*

Petitioner advances as a ground for the granting of the writ of *certiorari* (Petition, p. 3) the contention that the Circuit Court of Appeals decided the local law in a way probably in conflict with applicable local decisions.

The opinion of the Circuit Court of Appeals shows this charge to be baseless. After adopting Petitioner's statement of the New Jersey law (R., p. 72, 137 F. (2d) 62, 64), the lower court said (R., p. 73, 137 F. (2d) 62, 64):

> "In this case, assuming that the New Jersey law is applicable to the contract set forth in the policies, the defendant is entitled to whatever defense to liability on its promise to pay upon the death of the insured which the New Jersey law gives it. If honest misrepresentations by the applicant for insurance void the policies the defendant is entitled to be free

> from the liability if it makes out that defense. But the fact that it is either entitled or compelled to go to an equity court in New Jersey to establish the facts which free it from liability does not mean that this limitation is applicable when the suit is brought in a court where so-called legal and equitable defenses are both available in the some proceeding."

Petitioner's real grievance, therefore, must be the refusal of the lower court to uphold its claim to the precise remedy obtainable in Chancery of New Jersey. This is the heart of the case, and the remainder of this brief will be devoted to the propriety of this ruling.

B.

The New Jersey equitable remedy of cancellation is based not on differences in burden of proof but upon the Chancery Court's concept of adequacy of the legal remedy, which the Federal Courts determine under Federal law.

Petitioner's discussion of burden of proof (Brief, p. 12) is entirely alien to the question of whether its answer and counterclaim presented a case for cancellation by the trial court or one for trial by jury on all available issues of fraud. This depended on procedural and jurisdictional requirements and limitations of the forum, matters expressly excluded from the operation of state law under the doctrine of *Erie* v. *Tompkins, supra.* In a subsequent decision, *Russell* v. *Todd,* 309 U. S. 280, 286 (1940), rehearing denied 310 U. S. 658 (1940), this Court said:

> "The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state

courts afford. *Di Giovanni* v. *Camden Fire Insurance Ass'n.*, 296 U. S. 64; *Atlas Life Insurance Co.* v. *Southern, Inc.*, 306 U. S. 563. And the jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice. *Stratton* v. *St. Louis, S. W. Ry. Co.*, 284 U. S. 530, 534."

Petitioner argued below and also urges upon this Court that the District Court in New Jersey is bound to grant the equitable remedy of cancellation, the United Sates Constitution, the acts of Congress, the Federal rules and the decisions of this Court notwithstanding. The Circuit Court of Appeals in rejecting this contention correctly distinguished between *substance* and *procedure* and held that the substantive law of New Jersey on fraud in the procurement of insurance would be applied in a trial before the District Court and a jury, the legal remedy for such fraud being adequate in the Federal courts. The decisions of this Court in insurance cases supporting this ruling are cited under Point III, *infra.*

It is a basic principle that even though legal remedies in the Federal courts may sometimes be modified to suit changes in the laws of the states, the remedial right to proceed in the Federal courts sitting in equity cannot be enlarged by state law. *Russell* v. *Todd, supra, Whitehead* v. *Shattuck*, 138 U. S. 146 (1891); *Scott* v. *Neely*, 140 U. S. 106 (1891); *Cates* v. *Allen*, 149 U. S. 451 (1893); *Mississippi Mills* v. *Cohn*, 150 U. S. 202 (1893); *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 (1923).

In *Whitehead* v. *Shattuck*, *supra*, complainant out of possession of land filed a bill in equity to quiet title. Under

local Iowa law, such an action was maintainable. However, this Court held that the bill should be dismissed on the ground that complainant had a plain, adequate and complete remedy at law by way of ejectment. After discussing § 16 of the Judiciary Act and the Constitutional Amendment preserving trial by jury, this Court said (at p. 152):

> "* * * an action like the present can be maintained in the courts of that State, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that State cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

As a result of the foregoing principles, "A Federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court." *Pusey & Jones Co.* v. *Hanssen, supra.*

Matters respecting the remedy are governed by the *lex fori.*

Central Vermont Ry. Co. v. *White,* 238 U. S. 507, 511 (1915);
Johns v. *Wilson,* 180 U. S. 440 (1901);
Willard v. *Wood,* 135 U. S. 309 (1890);
BEALE, CONFLICT OF LAWS (1935) Vol. I § 8A.28, pp. 85, 86.

Likewise the question of whether an issue is to be tried by court or jury is a procedural one governed by the *lex fori.*

BEALE, CONFLICT OF LAWS, Vol. III, § 594.1, p. 1607;
The Restatement of the Law of the Conflict of Laws (1934), § 594, p. 709;
Diederich v. *American News Co.*, 128 F. (2d) 144 (C. C. A. 10th, 1942);
Hollingsworth v. *General Petroleum Corp of California*, 26 F. Supp. 917 (D. C. Oregon, 1939).

POINT II.

The Circuit Court of Appeals did not decide a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

Under this point respondents will deal with ground (b) advanced by petitioner for the granting of the writ (Petition, p. 4) and Point II of its argument which is captioned, "This Court has held that in diversity of citizenship cases, except where a Federal statute governs, a Federal Court, whether trial or appellate, must do exactly what a State Court sitting in its place would do with the questions before it". This statement is based on a misconception of the doctrine of *Erie* v. *Tompkins, supra,* and of subsequent cases applying it. It ignores the limitations imposed on the Federal Courts by the United States Constitution and the Judiciary Act. It disregards the qualification expressly stated in this Court's opinion in *Erie* v. *Tompkins* at p. 78: "*Except in matters governed by the Federal Constitution or by Acts of Congress,* the law to be applied in any case is the law of the State".

In *Black & Yates, Inc.* v. *Mahogany Ass'n, Inc.*, 129 F. (2d) 227 (C. C. A. 3rd, 1942), *cert. den.* 317 U. S. 672 (1942),

the same point was presented. The cause of action arose in Delaware, which like New Jersey, has separate courts of equity and law. It was urged that since an injunction would on the facts be granted by the Delaware Chancery Court, it followed that under *Erie* v. *Tompkins*, the Federal court sitting in that state must likewise give such relief. The Circuit Court, on appeal said (p. 233):

> "There is no doubt that the substantive law of Delaware gives the person who has received legal injury a right of action for trade libel or disparagement of goods. The question which we must decide therefore may be stated as follows: What is the remedy which may be granted in the District Court of Delaware? * * * The rule of *Erie R. Co.* v. *Tompkins* being determinative of substantive rights, there is still preserved to the federal courts a uniform basis for granting equitable remedies in cases in which substantive rights have arisen under state law."

Other cases applying *Erie* v. *Tompkins* and distinguishing between substantive rights and the remedies available in the Federal Courts are *Maxwell* v. *Enterprise Wall Paper Mfg. Co.*, 131 F. (2d) 400 (C. C. A. 3rd, 1942); *The Maccabees* v. *City of North Chicago*, 125 F. (2d) 330 (C. C. A. 7th, 1942) *cert. den.*, 317 U. S. 693 (1943); *First Camden National Bank & Trust Co.* v. *Aetna Casualty & Surety Co.*, 132 F. (2d) 114 (C. C. A. 3rd, 1942) *cert. den.* 63 S. Ct. 1157 (1943).

The cases cited by petitioner on pages 13-15 of its brief are not in conflict. They all recognize the distinction between the obligation to apply state substantive law and the availability of the same remedies in the Federal courts as are granted by state courts.

POINT III.

The ruling below is in harmony with a long line of insurance decisions by this Court involving the issue of fraud.

A.

The rule concerning fraud in the procurement of insurance policies prior to *Erie* v. *Tompkins* and the new Rules of Civil Procedure.

The Circuit Court of Appeals applied the rule supported by a long line of decisions of this Court that "in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy'." (R. p. 75, 137 F. (2d) 62, 65.)

This rule has its sources in (1) the Seventh Amendment to the Constitution providing that in suits at common law, where the value in controversy exceeds $20.00, the right of trial by jury shall be preserved, and (2) in § 16 of the Judiciary Act of 1789 providing that suits in equity shall not be maintained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law. (28 U. S. C. § 384, Judicial Code § 267.)

The Court, in applying the foregoing provisions, early enunciated the principle that "whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury". *Hipp* v. *Babin*, 19

How. 271, 278 (1857); *Grand Chute* v. *Winegar,* 15 Wall. 373, 375 (1873); *Lewis* v. *Cocks,* 23 Wall. 466, 470 (1874); *Root* v. *Railway Co.,* 105 U. S. 189, 212 (1881); *Killian* v. *Ebbinghaus,* 110 U. S. 568, 573 (1884).

That principle has consistently been applied to insurance cases involving the issue of fraud in the procurement of policies. *Phoenix Mutual Life Ins. Co.* v. *Bailey,* 13 Wall. 616 (1871) is one of the early leading cases in which, following comprehensive consideration of all pertinent materials, this Court held that after the occurrance of the loss insured against and in the absence of special circumstances of a *quia timet* nature (none of which are alleged or involved herein), fraud in the procurement of a policy is provable only as a defense in an action at law on the policy in the Federal courts and that the insurer may not obtain the equitable relief of cancellation. This rule was subsequently applied in *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288 (1903); *Enelow* v. *N. Y. Life Ins. Co.,* 293 U. S. 379 (1935); *Adamos* v. *N. Y. Life Ins. Co.,* 293 U. S. 386 (1935); *DiGiovanni* v. *Camden Fire Ins. Ass'n,* 296 U. S. 64 (1935); *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203 (1937).

No distinction has been drawn between equitable and legal fraud. *Livingston* v. *Maryland Ins. Co.,* 6 Cranch 274 (1810); *M'Lanahan* v. *Universal Ins. Co.,* 1 Pet. 170 (1828); *Prudential Ins. Co. of America* v. *Moore,* 231 U. S. 560 (1913). Although such a distinction was urged upon it by counsel in the *Enelow, Adamos, DiGiovanni* and *Stewart* cases, *supra,,* this Court has not differentiated between the several types of fraud in passing upon the adequacy of the legal remedies in the Federal courts and in refusing to allow the equitable relief of cancellation without special circumstances of a *quia timet* nature.

B.

The Federal rule concerning fraud in the procurement of insurance has not been altered by *Erie* v. *Tompkins* and the new Rules of Civil Procedure strengthen its rationale by eliminating certain *quia timet* grounds.

1. *The equity powers of the Federal courts, limited by § 16 of the Judiciary Act and the Seventh Amendment to the Constitution, are not enlarged by the doctrine of Erie* v. *Tompkins, supra.*

That the principle of the *Bailey* and other cases cited under the previous subdivision is still the law and was properly applied by the lower court to this case notwithstanding *Erie* v. *Tompkins* appears from the later decision of this Court in *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 570 (1939):

> "Ordinarily when the defense of fraud may be interposed to an action at law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law."

2. *Under the new Rules of Civil Procedure, most of the historic grounds for the cancellation of policies are no longer available to the insurer seeking such relief.*

The loss having occurred, an action on the policies having been commenced before they became incontestable and the Petitioner having joined issue, it is submitted that under the new Rules Petitioner has full protection against loss of legal defenses so that equitable relief is wholly unnecessary.

Rule 41 (28 U. S. C. following § 723c), subdivision (a), paragraph 1, governs voluntary dismissals without a court order, giving such right only where notice of dismissal is filed *before answer is served* or where a stipulation to that effect is entered into between the parties. Otherwise under paragraph 2, an action may not be dismissed at the plaintiff's instance save upon order of the court on conditions imposed upon it.

Professor Moore has considered the effect of this Rule on insurance policy suits:

> "Since the insurer's claim of fraud is a defense and not a counterclaim to an action begun by the beneficiary to recover the proceeds, (citing the *Enelow* and *Adamos* cases) protection must come, if at all, from the first sentence of paragraph (2). But this sentence, by eliminating voluntary dismissals as a matter of right, except as provided in paragraph (1), eliminates the former danger to insurers, for it is hardly conceivable that any court would permit a dismissal by the plaintiff of his claim where the defendant had pleaded the defense of fraud and dismissal might operate to deprive the defendant of such defense." (3 *Moore's Federal Practice* (1938) p. 3041.)

The possibility of loss of evidence and disappearance of material witnesses is nullified by the liberal provisions for the taking of depositions embraced in Rules 26-34 (28 U. S. C. following § 723c). These provisions, allowing the taking of the testimony of any party or witness by deposition upon oral examination or written interrogatories, including cross examination of deponents under the provisions of Rule 43 (b), the power to compel the attendance of witnesses by subpoena under Rule 45 and the use of dep-

ositions at trial in the absence of witnesses under Rule 26 (d) (3), completely overcome the dangers of loss of evidence formerly urged as grounds for cancellation.

Moreover, in insurance actions in the Federal courts there is now no need for an independent proceeding by way of counterclaim for cancellation. Rule 8 (e) (2), allowing defenses "on legal or equitable grounds or on both" to be pleaded, incorporates the practice under § 274 (b) of the Judicial Code (28 U. S. C. § 398). The *Enelow* and *Adamos* cases, *supra,* held that the equitable claims asserted by the insurers in their answering pleadings did not under § 274 (b) of the Judicial Code entitle them to a trial by a judge as Chancellor in view of § 16 of the Judiciary Act and the cases stemming from the *Bailey* case, *supra.* It follows that resort to a counterclaim is improper under the new Rules to achieve the same purpose. Inasmuch as Petitioner voluntarily removed to the Federal court the action instituted by the Respondents in the New Jersey Supreme Court, it is bound by the procedure of, and the constitutional and statutory limitations upon, the Federal courts and cannot resort to equivalents for the procedural steps which might have been available to it in the Court of Chancery of New Jersey.

POINT IV.

The decision of the Circuit Court of Appeals introduces no novel doctrines and cannot cause confusion.

Petitioner expresses the fear (Brief IV, p. 19) that confusion will result from the differences in procedure and practice which must be followed in insurance cases in the state courts and in the Federal District Court of New Jer-

sey. No such confusion can reasonably be anticipated even if such danger were material in determining an issue of jurisdiction and procedure. Members of the bar and particularly counsel for insurance companies will merely have to bear in mind that if they prefer the remedies obtainable in the Court of Chancery of New Jersey, they should not institute in, or remove to, the Federal court insurance actions in which, after the death of the insured, the defense of fraud in procurement of the insurance is to be asserted.

Petitioner asks how the Federal trial judge is to proceed (Brief, p. 21). The Circuit Court of Appeals has answered this question by stating that petitioner will have the benefit of all the New Jersey substantive law on fraud (R. p. 73, 137 F. (2d) 62, 64). The judgment entered on the verdict of the jury will be as dispositive of the controversy as an equity decree. Instructions applying state law to the effect that material false representations innocently made will avoid liability were submitted to a jury in *N. Y. Life Ins. Co.* v. *McCurdy*, 106 F. (2d) 181 (C. C. A. 10th, 1939), *cert. den.* 309 U. S. 656 (1940).

Real confusion would result were petitioner's argument adopted that under *Erie* v. *Tompkins* it is entitled to the same relief from the Federal District Court of New Jersey as is granted by the Court of Chancery of that state. The result would be that under *Metropolitan Life Ins. Co.* v. *Lodzinski, supra*, the District Court would be obliged to take jurisdiction of a bill charging conscious fraud, hear it without a jury and grant relief on proof of either legal or equitable fraud; and that under *Metropolitan Life Ins. Co.* v. *Babb, supra*, the District Court would on a bill disclaiming fraudulent intent hear the case without a jury and, upon the submission of proofs of intentional fraud, would be required to decree cancellation. Were these decisions to be considered part of the substantive law of New Jersey bind-

ing upon the Federal court, as petitioner argues, then the Judiciary Act and the Seventh Amendment can be nullified by state decisions, a wholly untenable suggestion.

Conclusion.

Petitioner has not established the existence of a substantial question on any one of the grounds assigned by it in its petition for certiorari. The Circuit Court of Appeals fully recognized the local law and the decisions of this Court. Long-settled doctrines are involved. From the standpoint of respondents, the only novel question is whether, with the insured unavailable to give his version of the alleged misrepresentations, their action to recover can be converted into a suit for cancellation of the policies by the mere expedient of charging fraud somewhat differently in the answer and counterclaim, but on the basis of the same questions and answers in the insurance application. This Court by the consistency of its application of the *Bailey* principle has indicated concern that an asset of such importance as insurance to the average family should not be lost, if the beneficiaries sue promptly after the insured's death, except by the verdict of a jury on the issue of fraud.

It is respectfully submitted that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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